

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ATLANTA BRANCH OFFICE  
DIVISION OF JUDGES

INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, LOCAL 1526, AFL-CIO  
(Hallmark Stevedoring, Inc.)

and

Case 12-CB-5156

LESTER ALEXANDER, An Individual

*Marcia Valenzuela, Esq.* for the General Counsel.  
*Neil Flaxman, Esq. (Flaxman, P.A.),* of Coral Gables,  
Florida, for the Respondent.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon a charge filed by Lester Alexander on May 8, 2003, as amended by a charge filed June 30, 2003 against International Longshoremen's Association, Local 1526, AFL-CIO (Respondent or Union), a complaint was issued on August 25, 2003 alleging that the Respondent (1) violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended (Act) since on or about November 8, 2002<sup>1</sup> by (a) maintaining and using unlawful subjective criteria in selecting and appointing employees to the position of "second man", including (i) good moral character with membership, (ii) loyal and dedicated to the long shore craft, and (iii) be a member in good standing, and (b) maintaining and using unlawful subjective voting requirements by giving sole discretion to the Executive Board in selecting and appointing employees to the position of "second man," and (2) violated Sections 8(b)(1) (A) and 8(b)(2) of the Act on December 16 by failing to select and appoint Alexander to second man positions with Employers Hallmark Stevedoring, Inc. (Hallmark) and Eller & Company (Eller) by using the unlawful subjective criteria and voting requirements described above, and for arbitrary, capricious and invidious reasons. In its answer to the complaint the Union admits that the criteria as described have been utilized, and it is admitted that "membership" should be excluded from such criteria. The Union also asserts that the criteria utilized by the Executive Board are not subjective, for the purpose intended. The Union denies violating the Act as alleged in the complaint, and it affirmatively argues, inter alia, (1) that in the situation at hand the Union should be allowed to establish criteria such as (a) good moral character, and (b) loyal and dedicated service to the long shore craft, and (2) Alexander is precluded from bringing this complaint because he did not avail himself of all the internal union remedies available to union members who feel aggrieved by actions of the Executive Board.

A trial was held in this matter on December 10, 2003 in Miami, Florida. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and the Respondent, I make the following

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<sup>1</sup> All dates are in 2002 unless indicated otherwise.

## Findings of Fact

## I. Jurisdiction

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It is admitted that Hallmark, a Florida corporation with an office and place of business at Port Everglades in Ft. Lauderdale, Florida, has been engaged in the business of loading, unloading and providing other stevedoring services. The complaint alleges, the Union admits, and I find that Hallmark is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

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## II. The Alleged Unfair Labor Practices

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## The Facts

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On or about December 1, 1990, Respondent, along with its International and other ILA local Unions, and Hallmark, along with Eller and other employers that are part of the Southeast Florida Employers Port Association, Inc. (SFEPA), entered into and since then have maintained successive collective-bargaining agreements for Southeast Florida Ports, including Port Everglades in Ft. Lauderdale, Florida, covering conditions of employment of a unit that includes Hallmark's longshorepersons, Eller's longshorepersons, and other employers' longshorepersons, and requiring, inter alia, that Respondent be the exclusive source of referrals of longshorepersons for employment with Heller, Eller, and other employers. At all material times, based on Section 9(a) of the Act, Respondent has been the exclusive collective bargaining representative of a unit that includes Hallmark's longshorepersons, Eller's longshorepersons, and other employers' longshorepersons.

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The involved collective bargaining agreement, the Union by-laws, and the Constitution and Rules of Order of the International Longshoremen's Association AFL-CIO were received by stipulation as General Counsel's Exhibits 9, 10, and 11, respectively.

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It is admitted that Ossia Rush is the Respondent's Executive Board Chairperson, Lewis Tunnage is the Union's President, Harold Walden is the Vice President, and Gus Wilkerson is the Financial Secretary.

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The Respondent admits that it operates an exclusive hiring hall and longshoremen get referred to jobs by going to the Union hall. The positions include crane operators, forklift drivers, tractor-trailer drivers, water boys, second men, headers, and porters. The Union has 10 cargo gangs and 5 porter gangs.<sup>2</sup> A header of the gang has the right to pick the people, based on seniority and qualifications, who will work with him on a particular day. The second man automatically goes with the header. Tunnage testified that the header, who supervises the gang including the second man, never determines who will be his second man, but the header can recommend someone; that the second man is just another member of the gang unless the header is absent; and that generally it has been the rule that when the header retires, the second man automatically becomes the header. Seniority of those who shape up is determined

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<sup>2</sup> Anyone working on a porter gang is able to receive tips. Customarily there are no tips on a cargo gang. Tunnage testified that for this reason it is more lucrative for a second man to work on a porter gang than a cargo gang.

with a union work card which shows the number of qualifying years.<sup>3</sup> As noted, individuals chosen must be qualified to perform the task involved, i.e. if a forklift driver is needed, the individual must be certified as a forklift driver.

5 Alexander testified that generally he goes to the Union hall every day at about 6 or 7 a.m.; that the header chooses individuals based on seniority and qualifications, which is called for by the hiring hall rules as stated in the collective bargaining agreement; that the business agents, Harold Walden or Gus Wilkerson III, make the final decision with respect to who works; that his work card, General Counsel's Exhibit 18, shows that he has 20 years of seniority<sup>4</sup>; that  
10 the Local has a pattern of not using seniority and qualifications when dispatching people as water boys and second men; and that as demonstrated by his March 18 letter set forth below, he attempted to rectify this problem.

15 As here pertinent, the stipulated minutes for the October 27, 1999 Executive Board Meeting of Local 1526, General Counsel's Exhibit 5, read as follows:

Mr. Hill explained that Eric Griffin declined being a Second Man to Lee William. ....

....

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The Executive Board voted on Second Men to the Header:

Stanley Lawson to Header Joseph Kelly, motion made and seconded, passed unanimously

Walker to Header T. Wallace, motion made and seconded, passed unanimously

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Bruce Phillips to Header Gus Roberts, motion made and seconded, passed by majority vote

Christopher Pinkey to Header Lee Williams, motion made and seconded, passed unanimously

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Wilbert Hill, Jr. to Header Jesse Wilson, motion made and seconded, passed by majority vote

As here pertinent, the stipulated minutes for the October 28, 1999 Executive Board Meeting of Local 1526, General Counsel's Exhibit 6, read as follows:

35 Wilbert Hill, Jr. declined and withdrew as Second Man to Header Jesse Wilson.

....

The Executive Board voted on Second Man to the Header:

40 Lester Alexander to Header Jesse Wilson, motion made and seconded, passed by majority vote.

Leonard Mitchell asked if William Anderson can have a temporary Second Man until Lynn Sheffield comes back. President Ellis Hill stated that we never had a temporary  
45 Second Man position. Leonard Mitchell made a motion that John P. Walden be temporary Second Man to Header William Anderson. Seconded by John P. Walden. There were no 'Ayes,' there were no 'Nays.'

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<sup>3</sup> Qualifying years means that the individual has worked a sufficient number of hours in a given year to qualify for medical benefits, other benefits, vacation, and holiday pay.

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<sup>4</sup> Alexander testified that he has 22 years of vested seniority.

As here pertinent, the stipulated minutes for the November 29, 1999 Executive Board Meeting of Local 1526, General Counsel's Exhibit 7, read as follows:

5 Lester Alexander declined being Second Man to Header Jesse Wilson.

Alexander testified that he was twice elected Recording Secretary beginning in 1999, and he presently holds that position; that he is responsible for taking notes of the Executive Board and Regular meetings, and he prepares, distributes and reads the minutes at the  
10 following meeting; and that if someone disagrees with the minutes, they are corrected.

In mid-January 2002 Alexander, as indicated in his March 18 letter set forth below and according to his testimony, advised Benny Holland, Jr., President of South Atlantic and Gulf Coast District, International Longshoremen's Association (ILA) that some positions in the Local  
15 were being assigned in violation of hiring guidelines as set forth in the Collective Bargaining Agreement of ILA 1526 & 1526 A. Alexander testified that Tunnage assigned people to permanent positions who had less seniority than others; that when a second man position opens, nepotism and family membership come into play; that the Executive Board has indicated that to be a second man, the individual must have ten years of vested seniority, and they should  
20 be drug free; and that no one has ever taken a drug test.

By letter dated March 18, stipulated General Counsel's Exhibit 17, Alexander advised Holland as follows:

25 I am writing this letter to inform you that the ongoing issue of seniority has once again reared its head in Local 1526

As you may recall, I wrote to you on January 16, 2002, to notify you that some positions in our Local were being assigned in violation of hiring guidelines as set forth in the  
30 Collective Bargaining Agreement of ILA 1526 & 1526 A originally effective October 1, 1991 (and since extended to present year). I am specifically referring to a situation where a union member of lower seniority was appointed over the objections of other union members with higher seniority, to the position of temporary second man. Sad to say, this situation has not yet been resolved: a person of lower seniority continues to  
35 occupy the temporary second man position.

Though I do not officially write this letter to you as a member of the Executive Board, I would like to note that many members of our Local have indeed approached me in my capacity as Recording Secretary and complained about the unfairness of (and possible  
40 illegality of) how our union has been handling the seniority issue. Many members are afraid of retribution, so I have taken it upon myself to speak for those who may be afraid to speak for themselves.

As loyal union members everywhere will undoubtedly argue, seniority is one of the cornerstones of strong unions; to run a Local in any other manner which fails to  
45 recognize the rights of workers as they 'pay their dues' and put in their time, only to see less senior members 'leapfrogged' over them, not only undercuts the values that we all build, but it can have catastrophic effects on moral.

50 The most recent procedural error which needs to be immediately addressed regards the position of 'Water boy.' Recently, our newly elected President of Local 1526 & 1526A, Lewis B. Tunnage, filled a vacant 'Water boy' position. Many of our members have

expressed great concern that a member of lesser seniority has been appointed to this position while other more senior members are available and willing to serve in this capacity.

5 President Tunnage stated during the ILA Local 1526 meeting of March 12, 2002, that  
 '... anyone who is complaining and has higher seniority than Herman Wilson can have  
 the water boy position ....' I am not sure of how many members with higher seniority  
 have requested the 'Water boy position,' (as I can only speak for myself), but I can state  
 10 emphatically that I have requested this position, and I was denied consideration. And I  
 do have more seniority than the person that was appointed. Other members have asked  
 me how this can be possible, but I have not found a suitable answer for them. As  
 Recording Secretary, it is my duty to maintain verbatim audio recordings of all  
proceedings. I will be happy to furnish copies upon request.

15 I have contacted you, because according to the policies of the International  
 Longshoremen's Union, it is your duty, as President of the South Atlantic and Gulf Coast  
 District of the ILA, to address this matter and help to resolve this situation. But the most  
 important reason in writing to you is because I know that you are a concerned and  
 caring man, and a professional representative of our union. You have always stood for  
 20 fairness; in my observations, you have dealt with all issues in an even-handed manner.

I realize that our President is new to his job. We all want to give him a chance to 'learn  
 the ropes' so he can succeed and become a good leader. I believe that a rising tide  
 raises all boats. Please don't come down too hard on him; perhaps you can offer him  
 25 some good advice and counseling to help him grow and serve us better. The goal is to  
 keep our union strong!

I respectfully request that you intervene and act immediately; let's keep our moral[e]  
 high! [Emphasis added]

30 A copy of this letter was sent to Tunnage. Tunnage testified that some people want the water  
 boy position because while they are supposed to work an eight hour day, some of them leave to  
 take care of personal business while they are being paid to be a water boy; and that very few  
 people would want to be a water boy when they can gain all those tips when working on a  
 35 passenger ship.

As here pertinent, the stipulated minutes for the March 20 Executive Board Meeting of  
 Local 1526, General Counsel's Exhibit 12, read as follows:

40 CRITERIA FOR BECOMING A SECOND MAN  
 (See copy)

1. At least ten (10) years qualified seniority (contract years) [The "(contract years)" was  
 crossed out with a pen and "vested" was handwritten above the cross out.]  
 2. Good moral character with membership.  
 45 3. Loyal and dedicated to the long shore craft.  
 4. Drug-free. Drug test required.  
 5. Be a member in good standing.  
 [Below these five criteria the following appears in handwriting: "The Executive Board  
 state [sic] these are the criteria that was accept [sic] by the Executive Board."]

50 The words "Good moral character" will come from Webster's Dictionary of "character,"  
 not a lay person's meaning.

Stipulated General Counsel's Exhibit 13, reiterates the five above-described criteria using the word "vested" instead of "(contract years)" in criterion number 1. When called by Counsel for General Counsel, Tunnage testified that these criteria, which only applied to the second man positions, were posted on the inside and outside bulletin Boards they have at the Union hall, he did not remember the exact date, he did not remember for how long, but they were posted shortly after the March 20 meeting when they were accepted; that criterion number 5, namely, "Be a member in good standing" had been eliminated about November 2003 because the Union had been advised by its attorney that this criterion was not lawful; that the Union was waiting on its attorney to give it "some workable criteria ... that's equitable to everybody" (transcript page 42) and "fair to everybody" (transcript page 43); and that at the present time the remaining above-described criteria are still in effect. Alexander testified that the Executive Board voted on and approved the criteria but the criteria were never approved by the members; that the International Union's General Counsel advised him that the Executive Board "sets up the criteria, [and then] take it to the members for the final approval" (transcript page 91); that the criteria were never presented to the membership for approval; and that he has recorded the minutes for the meetings of the Local for the last 5 years. On cross-examination Alexander testified that at the March 20 meeting he voted to approve the criteria for the second man positions because he felt that seniority should be the only factor in filling the second man position in that the first criterion calls for at least 10 years qualified seniority, and he assumed the member with the most seniority would be considered first; that the President and the Vice President of the Respondent put the criteria together and the other Executive Board members were given the criteria when they came to the March 20 Executive Board meeting; and that when he voted on the criteria at the March 20 Executive Board meeting he was under the impression that seniority and qualifications were the basis for selecting a second man. As indicated by the last page of General Counsel's Exhibit 12, at one point criterion 2 read "Good moral character with membership and officials of Local 1526." Harold Walden, the Vice President of the Local, testified that "and officials of Local 1526" was deleted because officials are part of the membership and it was not necessary to also have "and officials of Local 1526" in the criterion.

As here pertinent, the stipulated minutes for the April 2 Executive Board Meeting of Local 1526, General Counsel's Exhibit 3, read as follows:

After discussing that Randolyn Green had 8, not 10 years vested, President Tunnage asked Harold Walden to begin the voting for Second Man.

....

Lester Alexander stated he is not going to vote for anyone because a meeting held February 11, 2002, with District President Holland and others stated we have a seniority system for Second Man and when the members approve it, then a Second Man can be put in place.

Before Lester Alexander was allowed to finish his statement, President Tunnage stated, I told you not to bring up what Benny Holland said unless you have a letter from him. President Tunnage stated we have set a criteria for Second Man. Bringing up Benny Holland's name is well and good, but we have a criteria for Second Man.

....

Vice President [Harold] Walden asked what we are going to do with John P. Walden and

Header Willy Anderson. President Tunnage stated that he thought he had made it official at the last meeting that John P. Walden is Second Man to Header Willy Anderson. 'All in favor let it be known by the sound of "Aye." ' Lester Alexander stated that he was not in favor of this motion.

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President Tunnage stated that he was hurt that Lester Alexander has sent President Benny Holland a letter, and he said that Lester Alexander cannot send the Minutes to anyone. If so, he will have Lester Alexander in court for a number of reasons.

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Alexander testified that John P. Walden was appointed by Tunnage at an Executive Board meeting on April 2 to fill a second man position on a porter gang; that the Vice President of the Local, who is John P. Walden's brother, asked what they were going to do about the second man position and President Tunnage, who said that he thought that he already made John P. Walden permanent for that position, announced that John P. Walden would be the permanent second man to Header Willie Anderson; that after this meeting John P. Walden became a permanent second man; that he spoke out at this Executive Board meeting against giving the second man position to anyone until criteria were established for selecting the second man; that while there were criteria at that time, the members had not voted on that criteria at the time; that on April 2 John P. Walden, who was the Treasurer of the Local, was appointed as Header<sup>5</sup>; and that John P. Walden is not allowed to hold the positions of Treasurer and Header at the same time because it is prohibited by the International Constitution.

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By letter dated April 24, General Counsel's Exhibit 19, Holland advised Art Coffey and Clarence Pittman, both Vice Presidents of South Atlantic & Gulf Coast District, ILA, as follows regarding Local 1526 seniority complaints:

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As District Vice Presidents for that area, I am hereby requesting that you investigate the numerous seniority complaints from Local 1526 in Ft. Lauderdale. As you know, seniority issues are local issues, and the District does not normally get involved. However, I do believe we should find out if we can be of assistance when we have complaints from a number of members, as we have in this case.

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I have asked President Tunnage to review the matter with the local's attorney and meet with the men involved in an attempt to resolve their complaints. He is to provide me with a written report on the results of those meetings. Please contact Lewis [Tunnage] and provide such assistance as may be needed to address these problems.

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Copies of my letter of April 12 and the numerous complaints I have received are enclosed for your information.

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Copies of the letter were sent to Tunnage and Alexander.

By letter dated August 1, General Counsel's Exhibit 20, Clyde Fitzgerald, President of South Atlantic & Gulf Coast District, ILA, advised Tunnage regarding seniority complaints as follows:

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This will confirm the fact that I have asked the District's attorney, Jim Watson, to come to Ft. Lauderdale and meet with all parties in an effort to resolve the numerous seniority

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<sup>5</sup> As noted above, Tunnage testified that generally it has been the rule that when the header retires, the second man automatically becomes the header.

complaints that have been received by this office. Mr. Watson will meet with you at your local union at 9:00 a.m. on Wednesday, August 14, and will meet with the complainants at 9:30 a.m. on that same date.

5 Please let me know if you have any questions.

A copy of the letter was sent to Alexander.<sup>6</sup>

10 As here pertinent, the stipulated minutes for the September 3 Regular Executive Meeting of Local 1526, General Counsel's Exhibit 4, read as follows:

15 Harold Walden discussed the issue of a Second Man. He explained that Solomon McPhaul, Jr. would be a good Second Man for a number of reasons. Harold Walden nominated Solomon McPhaul, Jr. for Second Man. Randolyn Green stated that Solomon McPhaul would not be a good Second Man for a number of reasons.

Ossia Rush votes for Solomon  
Terrence Cunningham votes for Solomon  
John P. Walden votes for Solomon  
Lester Alexander votes for Solomon  
20 Gus Wilkerson III votes for Solomon  
Solomon McPhaul will be the Second Man to Wenton Ward.

Harold Walden stated that Jerome Griffin needs a Second Man. He stated that Louis Gayle would be a good Second Man. Harold Walden decided that we would not go by

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<sup>6</sup> General Counsel's Exhibit 20 is three pages. The first page is the above-described letter. The second and third pages are a memo from James R. Watson dated May 23 to Holland regarding seniority issues in general. As can be seen, the memo is not referred to in the body of the August 1 letter. Also it is not described as an attachment at the bottom of the letter. The memo ends with the following paragraph:

30 My suggestion is that all locals be encouraged to review their current referral policies to make sure they: (1) satisfy all legal requirements for non-discrimination; (2) give consideration to qualifications as well as seniority in job referrals; (3) provide an effective grievance procedure for individuals who have complaints about the hiring process; and (4) institute a training program for those persons who are involved in the referral process.

It also contains the following:

Typically, seniority is used in the longshore industry for hiring/referral purposes. The reason seniority was chosen as a basis for job referral is that there had been a history of favoritism and discrimination in the hiring process in our industry.

40 ....  
In our case a decision was made that referrals on the basis of seniority was the system that worked best in the longshore industry. The NLRB and various courts have ruled that referrals on the basis of seniority are permissible and, therefore, that this is an acceptable system.

45 ....  
... locals have agreed to refer individuals ... to ... employers... who are qualified for their specific needs.

... local agreements ... should say, referrals are to be on the basis of 'seniority and qualifications.' It is not necessary to agree that priority will be given to the most qualified person; but the locals could insist that priority be given to the most senior person(s) who possess(s) the qualification(s) required for the job. [Emphasis added]

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seniority for Second Man for a number of reasons.

Harold Walden Nominated Louis Gayle for Second Man to Jerome Griffin.

Randolyn Green votes for Louis Gayle

Ossia Rush votes for Louis Gayle

5 Terrence Cunningham votes for Louis Gayle

John P. Walden votes for Louis Gayle

Lester Alexander votes for Gary Hill

Gus Wilkerson III votes for Eddie McReed

10 Harold Walden stated that John Dudley needs a Second Man. Harold Walden nominated Terrence Cunningham.

Randolyn Green votes for Terrence Cunningham

Ossia Rush votes for Terrence Cunningham

Terrence Cunningham votes for Terrence Cunningham

15 John P. Walden votes for Terrence Cunningham

Lester Alexander votes for Lorenzo Dudley

Gus Wilkerson III votes for Terrence Cunningham

20 By letter dated September 13, stipulated General Counsel's Exhibit 16, Alexander advised Tunnage as follows:

25 This letter is sent to you as a professional courtesy to remind you of your memo circulated to the membership on September 3, 2002, and also to protest your unprofessional and highly improper actions towards me at Executive Board meetings. Though I have disagreed with you on many decisions, I have always respected the office of the Presidency of Local 1526.

30 In your memo, you stated that the 'Executive Board never has or will not show any type of retaliation because of someone expressing his/her thoughts [sic] (right or wrong).' .... I would strongly support such statement, if it were in fact true. However, we all know that actions speak louder than words, and 'one should be judged by their deeds, and not their words alone.'

35 Your actions and deeds are very clear. You have chosen to implement what amounts to a 'gag order' against me. As we are all aware, I many times find myself as the lone dissenting voice, as one vote on the opposing side of the majority of the Executive Board. In December of 2001, I was democratically elected by the membership of Local 1526. That meant that I was given a voice and a vote on the Executive Board. I was elected to speak up for many of those members who can not or are afraid to speak up for themselves. Yet, many times when I am duly recognized and then when I give oral arguments that your disagree with , you tell me to 'shut up'; this is conduct unprofessional and unbecoming of a President of a Local Union. No Mr. President, I will not shut up and I will not remain silent when there are many members of this union who look to me to represent their voices at the Executive Board level. I was elected to do a job, and do it I must, even if it means (as you have threatened) seeing you file grievances against me for just trying to do my job.

50 I will continue to execute my duties as Recording Secretary and as member of the Executive Board even though it means that you will, (contrary to your previously stated position otherwise) retaliate against me. You have badgered and ridiculed me for expressing opinions which represent those of members who have asked me to argue on their behalf. You have threatened me with retaliatory action by stating that you will file

grievances against me for not 'shutting up,' even after I have been recognized by the chair. My claims are supported by your statements which are clearly audible on the tape recordings of our proceedings.

5 As keeper of the official minutes of the meetings, I am obligated to make copies of this information available (within a reasonable amount of time) to any member who wants access; these are not for the exclusive use of the President. Though you as President of our Local 'outrank' me, we are both members of Local 1526; we were not anointed to dictatorships, but rather as stewards acting in the best interests of the membership, in a  
10 democracy this means that sometimes there will be non-unanimous and conflicting opinions. We must never forget the responsibility that goes with our positions. [Emphasis added.]

15 A copy of the letter was sent to District President Clyde Fitzgerald, President Art Coffey, and President Clarence Pittman.

Alexander testified that Tunnage responded to his September 13 letter when he presented it to Tunnage, by telling him, after Tunnage read the letter, while they were alone in the conference room in the Union hall that he was going to take his union card, kick him out of  
20 the Local, and bar him from the Union hall.

Stipulated General Counsel's Exhibit 14 are the Executive Board minutes for November  
19.

25 As here pertinent, the stipulated minutes for the December 11 Regular Meeting of Local 1526, General Counsel's Exhibit 8, read as follows:

Lester Alexander explained to the Members of Local 1526 that the Executive Board Members have already conspired to give the second man position for Header Willie Mann to Ervin Byne. He explained to the Members that there is nepotism, favoritism, and family running the Local. He also explained to the Members that the International  
30 Constitution Article XIII, Section 4 talks about a Header [referring to John P. Walden] being on the Executive Board.

35 President Tunnage stated that he has a letter regarding this matter that is dated December 2, 2002. Gus Wilkerson III acknowledged that President Tunnage gave him a copy of this letter today.

Alexander testified that he was informed that John P. Walden could not act as Treasurer and Header simultaneously in December 2002 before a vote was taken as to who would be second man to Willie Mann; and that Article XIII, Section 4 of the Constitution and Rules of Order of the International Longshoremen's Association, page 24 of General Counsel's Exhibit 11, reads as follows:

45 No member who is an officer, director, partner, or principal in , or is employed in a supervisory job by, a business organization with which the I.L.A. or any of its subdivisions, bargains or seeks to bargain collectively, can at the same time hold any office or be a candidate for any office in a local union of the I.L.A.

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Alexander further testified that John P. Walden became a header in the first quarter of 2002<sup>7</sup>; that he was pointing out at the December 11 meeting that what John P. Walden was doing was prohibited by the International Constitution; that John P. Walden was in violation of the Constitution; and that the International Constitution does not provide for the continuation in the Union office in an acting capacity until he is replaced.

By letter dated December 11, stipulated General Counsel's Exhibit 15, Alexander's attorney, Costell Walton, Jr., advised Tunnage, and Rush as follows:

As you are aware, I represent Lester Alexander, a member of ILA Local 1526 with in excess of twenty (20) years of seniority.

In the recent past, my client has been passed over for header positions, and a Second Man position is presently open and being considered.

My client is available and has requested appointment to the Second Man position, however, it is anticipated that he will again be passed over for the position as retaliation for his demand for adherence to appropriate hiring hall rules and practices by the union leadership.

It is my client's desire that he be considered for appointment to the open Second Man position in view of his qualifications, seniority and experience.

However, as you are aware, the seniority system which was to have been developed and presented to the membership of Local 1526 for approval, has not been established as required.

It is my client's position that no appointments be made until the seniority system had been developed and approved by the Local, as required.

Further, it is my client's position that all appointments unilaterally made by the President, Lewis Tunnage, be voided because of the arbitrary, discriminatory and capricious manner in which they have been made.

It is my opinion that contrary to the Constitution and by-laws of the International and Local, actions have and continue to be arbitrarily undertaken to the harm and damage of the membership of the Local.

Demand is hereby made for cessation of all such activities, actions and appointments until and after a review of all appointments as to their compliance with the constitution, by-laws and hiring practices of the International and Local had been made.

If a positive response is not received to my client's demand within seven (7) days of your receipt of this letter, appropriate action(s) will be taken.

As here pertinent, the stipulated minutes for the December 16 Executive Board Meeting of Local 1526, General Counsel's Exhibit 2, read as follows:

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<sup>7</sup> As a header, John P. Walden is considered a supervisor of the employer as defined in Section 2(11) of the Act. *North Carolina Shipping Association*, 326 NLRB 280 (1998).

President Tunnage stated that Floyd Harper will be the second man to John P. Walden. He also talked about a second man to Header Willie Mann.

Harold Walden votes for Ervin Bynes. Randolyn Green voted for Lester Alexander. Ossia Rush voted for Ervin Bynes. Terence Cunningham voted for Ervin Bynes. John P. Walden voted for Ervin Bynes. Lester Alexander voted for Lester Alexander. Gus Wilkerson III voted for Lester Alexander.

President Tunnage stated that Ervin Bynes will be the second man to Header Willie Mann.

Secretary Lester Alexander was unable to finish the Meeting.

When called by Counsel for General Counsel, Tunnage testified with respect to the December 16 meeting that Alexander expressed his interest in the second man position to work with Header Willie Mann; that a majority of the Executive Board members voted for Bynes over Alexander; that at the time Alexander had more seniority than Bynes; that Alexander was qualified for the second man position; that Bynes is Harold Walden's cousin; that Harold Walden is the Vice President of the Local; that Bynes still works in the involved second man position; that he believed a second man slot for a porter gang did become vacant after Bynes got the second man position on December 16 in that there was a second man position opening under John P. Walden but Alexander declined; that John P. Walden, who voted for Bynes on December 16 (and who is Bynes cousin), is no longer on the Executive Board because he is a Header and he can not be a Header and be on the Executive Board at the same time; that John P. Weldon was the Treasurer of the Union prior to the December 16 Executive Board meeting; that he was not told before December 16 that John P. Walden could no longer be Treasurer of the Local; that he was told before December 16 that John P. Walden had to be replaced, but not that John P. Walden could not perform his duties and had to resign and step down immediately; that a new Treasurer was elected in the first quarter of 2003; that he did not recall if the District advised him that John P. Walden had to be replaced before December 16; that the vote was four to three in favor of Bynes, and if John P. Weldon did not vote, the vote would have been three to three; and that when there is a tie he has the deciding vote. Tunnage subsequently testified that he believed that there is a provision in the International Constitution which precludes a header from holding office in the Local, and the provision allows the individual to continue as an acting officer of the Local until he, as here pertinent, is replaced.

Alexander testified that he stated at an earlier membership meeting that the Executive Board had conspired to give the second man position on Header Willie Mann's porter gang to Bynes; that when the Board members gave the second man position to Bynes he spoke up at the meeting, indicating that he did not agree with the Board members giving the second man position to someone with lesser seniority, they should have criteria set up, and they should follow the collective bargaining agreement in giving out second man positions; that at the time Bynes had about 16 years seniority; that Bynes served as second man after this meeting; that Bynes is a cousin of Vice President Harold Walden and Treasurer John P. Walden; that he has never failed a drug test; and that when he voted for Bynes for the second man position, John P. Walden was both a Header and the Treasurer of the Local, which as indicated above, is prohibited by the International Constitution. On cross-examination<sup>8</sup> Alexander testified that at

<sup>8</sup> The Respondent's attorney, Neil Flaxman, did not cross-examine Alexander when Counsel for General Counsel called him because Flaxman wanted to call two witnesses to briefly sponsor some exhibits. Subsequently Flaxman called Alexander for what was, in effect, his

Continued

this meeting of the Executive Board Tunnage said that he wanted someone other than Alexander to be chosen for the second man position; that some of the other Executive Board members indicated that they wanted someone other than Alexander to be chosen for the second man position but they did not give their reason; that he should have received the second man position based on his seniority and qualifications in that he has worked as a porter; and that he did not appeal the Executive Board's decision with respect to giving the second man position to Bynes because it would be like beating his head against a brick wall. On redirect Alexander testified that at the December 16 Executive Board meeting when Bynes was elected as second man the Executive Board members never discussed tip solicitation or any complaints from employers or any grievances, and complaints from employers or grievances were not distributed. Subsequently Alexander testified that he was more qualified for the second man position than Bynes "on a lot of character reasons" (transcript page 183); that character comes into play with regard to qualifications; and that the solicitation of tips should be taken into consideration with respect to qualifications. On rebuttal Alexander testified that grievances against him never came up at meetings during 2001 or 2002; that he left the December 16 meeting before it ended; that he was present when the Executive Board members discussed the two second man positions; and that he was present when the vote was taking place on the second man positions.

Subsequently Alexander testified that after December 16 another second man position opened up on a porter gang and he did not apply for it because the header was John P. Walden and he had more seniority than John P. Walden; that he did not want any animosity between himself and John P. Walden; and that he did not want to work with John P. Walden.

Edwin Stewart, who is the Fund Manager for the ILA Employers' benefit funds, sponsored Respondent's Exhibits 5 and 6 which show that Alexander had 3 years more seniority than Bynes in December 2002.

#### Alleged Tip Solicitation Evidence

Before he called anyone who was present at the December 16 Executive Board meeting the Respondent's attorney, Flaxman, had two witnesses testify about and sponsor certain documents which refer to alleged tip solicitations. At the outset Counsel for General Counsel objected to such evidence as being irrelevant. The involved transcript reads as follows:

MS. VALENZUELA: I object, your Honor. This is irrelevant.

MR. FLAXMAN: Your Honor, these documents - - the evidence will show these documents were part of the decision making process. They were in Lester Alexander's file.

It lays the predicate for this disciplinary action taken by the Committee against Mr. Alexander, which in part was the basis for its decision, the Executive Board's decision. Everybody had knowledge of it.

The evidence will show Mr. Alexander was suspended from being a porter because of solicitation of tips. And it goes to the allegation that this was an invidious, I think they call it, get even type of scheme as compared to a fair and reasonable

cross-examination. Accordingly, his subsequent questioning by Counsel for General Counsel and his own attorney will be treated as redirect.

decision.

MS. VALENZUELA: Your Honor, I understand what Respondent feels will be produced. However, that connection has not been made yet and, therefore, it is irrelevant.

MR. FLAXMAN: Your Honor, at this point I would like to introduce and we explain that I'm in this position only because of counsel having refused to go ahead and to prove the authenticity of these documents after once having done this.

I will tie it up. If I do not tie it up, you can strike it, but I will tie it up. This is [sic] documents that already have been identified for identification. Now I have to try to get them in evidence. [Emphasis added]

JUDGE WEST: You put the cart before the horse.

....

MR. FLAXMAN: Well, Your Honor, I have the man here. May I please present the evidence and then you can certainly, if I don't tie it up, consider it irrelevant. [Emphasis added]

JUDGE WEST: Subject to connection, proceed.

....

Q. All right. Do you have your records and documents with you, sir, concerning that complaint?

A. Yes.

MS. VALENZUELA: Your Honor, I have a longstanding objection based on relevance, concerning any complaints or incidence concerning tips solicitation for the same reason.

MR. FLAXMAN: No, these are all the files. The evidence will be these are facts that the Executive Board considered. [Emphasis added]

....

MR. FLAXMAN: Your Honor, I have live witnesses at that time will testify that this was common knowledge. It doesn't happen often. It was in the mind - - Mr. Tunnage will testify that was a consideration. Mr. ... Harold ... [Walden] will testify .... that was one of his considerations. This is - - goes to the heart of the fact that this was not a conspiracy, this was not based upon nepotism, this was not based upon anything but under what we claim is a criteria that the Board should consider, the Executive Board should consider. [Emphasis added]

Whether it's qualifications, experience or whatever it is, I certainly should have a right to show the fact that this man was suspended as a porter for taking tips. He couldn't even work as a porter for taking tips. And certainly this should be a criteria.

JUDGE WEST: But the suspension is relevant only if in fact, we can determine whether it was actually considered. Question one ... you have the minutes.

Did you have any open discussion of this tip matter during the Executive Board meeting before a vote was taken?

And is that open discussion during the Executive Board meeting covered in the minutes that we have now received in evidence with respect to the December 16, 2002 meeting?

MR. FLAXMAN: Okay. The answer to your question is they are not covered in the minutes. The reason they're not covered in the minutes because the minutes are not a verbatim transcript of everything that's prepared by Lester Alexander, but we approved them.

So we're not questioning the validity of the minutes. Not everything is in the minutes. The issues related to a discussion, yes. We have testimony. I'll have to tie this up from both Mr. Tunnage and both Mr. Harold Walden. [Emphasis added]

Yes, they considered the man, in fact, soliciting tips. I mean that was one of the considerations.

JUDGE WEST: Considered, discussed open[ly] ... during the Executive Board meeting?

MR. FLAXMAN: You'll hear from the witnesses. Yes it was discussed. They knew about it. They knew Mr. Alexander's background. They knew all these things. They considered it. [Emphasis added]

Now, whether you believe it or whether or not you want to say it's not true, that's fine, but this is the heart of my case. This gentleman was suspended. It's very rare that this happens.

These documents I got from his file. Everybody knew about it, everybody considered it. I mean everybody - - this is not a secret. [Emphasis added]

JUDGE WEST: That would be very important if such a discussion, in fact, occurred, and that discussion was not covered in the minutes for the December 16, 2002 Executive Board meeting.

We've heard testimony that any member, upon a subsequent reading of the minutes, could object and the minutes would be corrected.

Is there any record, any subsequent correction of the December 16, 2002 minutes - -

MR. FLAXMAN: No, but this - -

JUDGE WEST: - - to show that there was a discussion, an open discussion during the Executive Board meeting in front of all the Executive Board members of this tip question?

MR. FLAXMAN: No, your Honor, because they're not a verbatim transcript. I mean the meetings go on for two hours, you have two pages of minutes. So the answer is no, and no one thought the necessity of doing it.

5           Everybody - - I mean ... it's wonderful if somebody would have said amend the minutes to put all - - if you look at all the minutes, there are two pages, three pages; they are not a verbatim transcript.

10           So to say that they're not in there means it never occurred is to pre-judge the case. Allow my witnesses to be presented and show you it did occur. At least they are - - everyone knew about it. It was a consideration. [Emphasis added]

15           JUDGE WEST: Not pre-judging the case, but in other words there is no written documentation whatsoever about this discussion, which assuredly took place during the December 16, 2002 Executive Board ... meeting?

20           MR. FLAXMAN: I don't know of any documentation which memorializes other than the records, the personnel file of Mr. Alexander himself, that memorializes those things, other than the file. I mean - -

25           JUDGE WEST: Does it memorialize anything with respect to the December 16, 2002 Executive Board meeting?

30           MR. FLAXMAN: No, other than the fact that it's in the file. I mean that was his personnel file. I got these documents from his file. I got it from the people that have the file of Lester Alexander.

35           Harold [Walden], on the Executive Board has the file. That's where I got these documents. Had the documents not been in the file, I would have a heck of a problem. That's where I got these documents

40           This wasn't a secret. I mean everybody was involved in this process. This is an unusual situation.

45           JUDGE WEST: I'll take it subject to connection. [Transcript pages 96 - 103]

....

50           JUDGE WEST: Is there going to be any testimony that the Executive Board members specifically considered these documents on December 16, 2002?

55           MR. FLAXMAN: Yes. There's going to be testimony that they considered the personnel file of Mr. Alexander; that they knew about it. This was not a secret. Everybody knew about this. This was not a secret.

60           JUDGE WEST: Is there going to be testimony that any Executive Board member reviewed the letters that we are discussing now - -

65           MR. FLAXMAN: I cannot - -

70           JUDGE WEST: - - on December 16, 2002?



MR. FLAXMAN: I can't - - I can say they knew about it. Whether they reviewed it on that date, it was in their mind. They knew about it, but whether or not they reviewed it that date, I can't tell you that - -

5 JUDGE WEST: Okay. Now - -

MR. FLAXMAN: - - in all fairness.

10 JUDGE WEST: - - with respect to the statement that it was in their minds, in other words at some point you are going to be introducing testimony, or eliciting testimony that the Executive Board members - - actually it might not have been on December 16, but sometime either on December 16 or before December 16, those Executive Board members read the letters that you are eliciting testimony with respect to now?

15 MR. FLAXMAN: Read them or knew that they - -

JUDGE WEST: No, read them, not knew.

20 MR. FLAXMAN: Judge, I can tell you that they knew about the letters, they knew about the threats. That's all I can tell you.

25 Whether they read them, I don't know. Whether they scanned them, I can't tell you. All I know is that that was part of their decision making process, in the sense that they knew about it. Just as if I knew about something about an employee, and it goes to that person's ability to perform a job, I may not have read every word, but if I know about something, I know about it.

30 And this is the actual letter itself. Rather than say, well, I knew that he had tried to sue Mr. Healey, this is the letter, this is the document that supports a statement of someone saying, you know, I knew about what Mr. Alexander was doing.

35 I knew about the tips. I knew about the fact that he was threatening an Employer. I mean I don't know what can be worse than threatening an Employer for a Union member, whether it's a suit or not a suit.

40 I mean it certainly - - he has a right to do it legally, there's no question about it, but we do have procedures and guidelines within the Union, which basically indicate what you do.

You file a grievance if you have a problem, you don't threaten to sue an Employer. You know.

45 JUDGE WEST: The objection's overruled subject to connection. [Transcript pages 112 – 114]

....

50 MS. VALENZUELA: I object, your Honor. Again, irrelevant, no connection has been made.

MR. FLAXMAN: Your Honor, I'll tie it up. I have the documents, which I'm going

to introduce with Lester Alexander's personnel file, which everybody knew about. It was part of the decision making process. [Emphasis added]

MS. VALENZUELA: Again, that hasn't been established.

MR. FLAXMAN: I will establish it.

JUDGE WEST: Subject to connection. [Transcript page 134]

Stephen Healey, who is the Senior Superintendent for Eller, was called by the Respondent and he testified that Eller is a stevedoring and ship agency in Port Everglades, Florida; that about 95 percent of cruise ships use stevedores at Port Everglades; and that his company is part of the SFPEA, which has a collective bargaining agreement, General Counsel's Exhibit 9, with various Locals of the ILA, including the involved Local, which agreement contains the following:

18. (B) Any person soliciting gratuities as a Porter shall be brought before the Joint Labor Relations Committee for discipline.

18. (B) (1) The parties recognize the critical importance of the passenger trade industry and the necessity of treating passengers properly and fairly. Accordingly, if an employee attempts to coerce tips from passengers, or maliciously damages their baggage or possessions, or otherwise improperly mistreats passengers, such employee shall be subject to disciplinary action.

Such disciplinary action shall be progressive in nature and may include suspension from working on passenger ships and for repeat offenders more stringent disciplinary action up until and including discharge.

Healey further testified that a cruise line can use another company if it is not happy with Eller's services; that on September 9 or 10, 2001 he was informed by his superintendent that there had been some sort of an altercation between Alexander and a passenger on the Grand Princess; that it involved the solicitation of a monetary tip for handling the baggage; and that he forwarded a letter to the Union dated September 10, 2001, Respondent's Exhibit 7, which reads as follows:

On September 9, 2001 Lester Alexander was employed as a porter by Eller and Company and was working at the MW Grand Princess. There was a documented incident between Lester and passengers involving tip solicitation. As you are aware, Eller does not permit tip solicitation. The passengers wrote a letter detailing the incident and Princess Cruises management will follow that up with their own letter demanding that Lester be prohibited from working on their ships.

As a result of Mr. Alexander's behavior and at the request of Princess Cruises, Eller and Company will no longer employ Mr. Alexander as a porter on any cruise vessel. Thank you for your attention to this matter as it is of prime importance to our profession.

Attached to Healey's letter is a one page handwritten note about an incident. It is dated "9/9/01" with "Dave Roberts, Grand Princess, RME 718" written at the top. The body of the note reads as follows:

We dropped four bags off with the porters on the front curb.

The guy we dropped it off with mentioned to my wife that \$2.00 per bag is customary. I asked if I should pay now or later [and] he said now since we may not be there when he gets there.

5 3 of our 4 bags showed up outside of our room about 1 ½ hours after we dropped them off.

10 We went back to where we dropped them off and a different porter confided in me that sometimes bags get separated and later a 'happy porter' will deliver it looking for an extra tip.

Missing bag is an American Tourister.

15 By letter dated October 10, 2001, Respondent's Exhibit 9, Alexander advised Healey as follows:

RE: DEFAMATION OF CHARACTER, LIBEL, SLANDER AND NEGLIGENCE

20 Dear Mr. Healey:

This is a response and Formal Demand for a public apology and retraction of your letter dated September 10, 2001, regarding your negligent, libelous accusations and statements in that letter ... stating that I solicited tips from a passenger, Mr. Dave Roberts, that I am terminated from Princess Cruises and Eller and Company, Inc., based upon documented evidence.

30 By exposing your letter to, inter alia, Mr. Ellis Hill, President of the Local ILA 1526, a third party, you have damaged my character and reputation within Mr. Hill and the entirety of the Local ILA 1526 of which I hold office. The accusations in your letter are the proximate cause of, and have become common knowledge to my co-workers, subordinates, supervisors, and peers.

35 If indeed you have proof of the libelous statements you made in your letter, now is your opportunity to support those statements, as the truth is an affirmative defense to libel. I certainly support your 1st amendment right to speak your mind, but the mistake you made was notifying third parties in an obvious attempt to defame my character and good standing in my livelihood and among others around me. Therefore the primary element for libel to prevail now exists. Moreover, you have informed others of your accusations and punishment to me verbally evincing the elements for Slander and Defamation of Character. Furthermore, you have negligently performed your duties in your investigation of this matter and have taken the word of a person who has no personal knowledge of the incident alleged. Therefore negligence lies.

45 Pursuant to the Florida State Statutes this is your opportunity to, within five (5) days of the date you receive this formal notice, retract and apologize to me, each and every member of the Local ILA 1526, each and every employee of Princess Cruises and Eller and Company, Inc., for the defamation of my character, libelous written accusations, slanderous oral statements, and your negligence in conducting your investigation of this matter. However, if you feel you have 'proof' of your accusations, this is also your opportunity to produce same.

50 My intent, Mr. Healey, is to bring an action at law against you and any and all other

persons, including Eller and Company, Inc., who support your actions for defamation and your public attack of my character.

You have five (5) days to respond to this notice or be governed by the Doctrine of Estoppel by Acquiescence. This is the only communication you will receive from me regarding your opportunity to recant your libelous statements.

Copies of this letter were sent to Princess Cruises, Norman Spencer, who is described as the President of Eller, and Ellis Hill, the President of Local ILA 1526.

Healey also sponsored Respondent's Exhibit 8, which is a letter dated January 30 from Norman Spencer, who is the Senior Vice President of Eller, to Local 1526, which reads as follows:

I received a call from Mr. Mario Terlizzo, Celebrity Cruises, informing me that for two weeks in a row a porter whose badge number was 119 has been reported by passengers for tip solicitation. Mr. Terlizzo has now requested that Mr. Lester Alexander, who was issued badge number 119, not be employed as a porter at any Celebrity vessels. I will forward this information to Chuck Maravolo and schedule a grievance hearing as per the contract. Thank you for your attention to this matter.

On cross-examination Healey testified that he had no personal knowledge of these incidents in that he was not present when they occurred; that his understanding of the September 9, 2001 incident came from what he was told by Eller's superintendent who spoke to a representative of the cruise line; that he believed that badges were issued to the porters after this incident so that passengers would be able to identify a porter; that Alexander was suggesting that someone else had caused the problem, and he was attempting to straighten the matter out; and that the note from the passenger about a second porter trying to help him comports with what Alexander was stating in his letter.

Charles Maravolo, who is the Secretary-Treasurer for SFEPA and who was called as a witness by the Respondent, testified that Eller had filed a grievance against Alexander regarding the solicitation of tips; that a grievance hearing scheduled for February 19, Respondent's Exhibit 1, at the Port of Miami, Florida was postponed when Alexander was asked to leave the Port because an issue arose regarding whether Alexander had properly gone through security<sup>9</sup>; and that a grievance meeting was held on March 12 and he sent a letter on March 13, Respondent's Exhibit 2, to Alexander c/o Local 1526 advising him that the Grievance Committee decided that (a) he was prohibited from being a porter for Princess Cruise Lines and Celebrity Cruise Lines, (b) he could work store gangs for these lines, and (c) he could be a porter for all other cruise lines that do business in Port Everglades. Maravolo also sponsored two other exhibits, namely Respondent's Exhibits 3 and 4. Taking the latter first, it is a letter dated July 17, from attorney Neil Flaxman to attorney Donald Ryce, and it reads as follows:

This office represents International Longshoreman's Association, Local 1526, who is pursuing a grievance on behalf of Lester Alexander.

On September 9, 2001, Mr. Alexander was accused of inappropriate conduct (rudeness and requesting a tip). Also, Mr. Alexander was accused on January 30, 2002

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<sup>9</sup> The SFEPA notice indicates that Alexander was suspended from portering from all companies until he appears at the next grievance meeting.

of requesting tips from unknown passengers.

In March of 2002 a grievance hearing was held before the Grievance Committee and the Grievance Committee prohibited Mr. Alexander from portering for Princess and Celebrity Cruise Lines which cruise lines are serviced by your client, Elder and Company, Inc. out of Fort Lauderdale.

The Collective Bargaining Agreement provides that:

Any person soliciting gratuities as a Porter shall be brought before the Joint Labor Relations Committee for discipline. [The parties recognize the critical importance of the passenger trade industry and the necessity of treating passengers properly and fairly.] Accordingly, if an employee attempts to coerce tips from passengers, [or maliciously damages their baggage or possessions, or otherwise improperly mistreats passengers,] such employee shall be subject to disciplinary action. Such disciplinary action shall be progressive in nature and may include suspension from working on passenger ships and for repeat offenders more stringent disciplinary action up until and including discharge. [Citation omitted]

There is no intent from such provision that the conduct, even if true (Mr. Alexander does deny the conduct occurred.) would result in a lifetime ban.

More than six months have elapsed since the act complained of and more than four months have elapsed since the ban related to working with the Princess and Celebrity Cruise Lines was ordered by the Committee.

Accordingly, as a result of the passage of time and the language of the applicable provision, Mr. Alexander is requesting the ban be lifted at this time.

Since both parties are represented please consider this the first step in the grievance process with the grievance being specifically the lack of specificity as to the length of the ban and the request to lift the ban as a result of the passage of time and the contract language.

Respondent's Exhibit 3 is a letter dated August 14 from Maravolo to Flaxman which reads, as here pertinent, as follows:

I am in receipt of your letter to Mr. Donald T. Ryce dated July 17, 2002, concerning ... [Alexander].

Mr. Lester Alexander may return to work as a porter for all lines in Port Everglades.

Please advise Mr. Alexander that if he comes before the grievance committee for his behavior/actions towards passengers and is found to be at fault by a Labor Relation Committee, he could receive more stringent disciplinary action as stated in the Collective Bargaining Agreement.

On cross-examination Alexander testified that his suspension from being a porter for two cruise lines was never mentioned to the Local's Executive Board; that to his knowledge only Tunnage knew about Respondent's Exhibit 2 which is the above-described letter dated March 13 prohibiting Alexander from working as a porter at two named cruise lines; that according to

Respondent's Exhibit 2, Harold Weldon received a copy; that he discussed his suspension with members of the Executive Board in 2003 when Tunnage brought it to the Executive Board's attention in 2003; that he explained his side when Tunnage made some allegations against him in 2003; that he did not say anything to the Executive Board about the suspension until after he was addressed with this in an Executive Board meeting in 2003; that when Tunnage brought up the suspension at an Executive Board meeting in 2003, the Executive Board members did not indicate that they already knew about the situation; that if a person is truly soliciting tips he did not believe that the person is qualified to be a second man; that whether a porter violates the collective bargaining agreement by soliciting tips would affect that person's qualifications if that was a part of the criteria being considered to fill a position; and that he has never solicited tips in his 23 years of being a longshoreman at Port Everglades. On redirect, Alexander testified that two grievances were filed against him; that he was the one who tried to solve passenger Robert's situation; and that Roberts never pointed him out as the one who asked for tips. On further cross-examination Alexander testified that he did appear before the committee which heard the grievances regarding soliciting tips; that he presented his case; and that he was suspended. Subsequently Alexander testified with respect to the first grievance that he saw Roberts leave the terminal and approach the porters; that he asked Roberts if he could help him; that Roberts explained that he had already checked his bags and he was looking for a cosmetic case for his bride; that he tried to find the cosmetic case for Roberts; that he found out that Roberts had previously paid another porter two dollars; that a stevedore superintendent walked over to him and asked him for his badge number; that he showed his badge number to the stevedore superintendent; that he used his cell phone to call Tunnage, who was Vice President of the Local at the time, and he told Tunnage that someone had approached Roberts soliciting a tip; that he called Tunnage after the stevedore superintendent asked him for his badge number; that he was required by the stevedore superintendent and his header to leave before his shift actually ended; and that with respect to the second grievance

I told Management when I went in front of the grievance hearing, I had no knowledge of it. And I swear to God on my father and mother's grave, I still don't have no [sic] knowledge of it.

On further redirect Alexander testified that he learned that a different porter asked Roberts for a tip because it was in Roberts' complaint; and that the issue that he was referring to regarding Bynes could have been considered pursuant to a provision of the criteria that was never enforced, namely the drug test.

Before Harold Walden testified, Alexander testified that the tip solicitation issue was not discussed by the Executive Board members at the December 16 Executive Board meeting when the vote was taken on the second man position that Alexander sought. As Alexander testified, President Tunnage and Vice President Harold Walden knew about this matter. But Alexander testified that the Executive Board members were first told by Tunnage about the grievance against Alexander for tip solicitation in 2003, which obviously would have been after the December 16, 2002 vote. As noted above, Respondent's attorney knew that the minutes of the December 16 meeting did not demonstrate that there was any discussion of the tip solicitation issue. In light of this, what evidence does the Respondent's attorney elicit or introduce to demonstrate that the tip solicitation issue was discussed and considered by Executive Board members on December 16 when they voted on whether Alexander should receive a second man position? As noted above, audio recordings are made of the meetings. Contrary to his many assurances specifically described above, Respondent's attorney did not make the connection. In his attempt to demonstrate a connection, Respondent's attorney called only one witness, Harold Walden, who is the cousin of Bynes. Harold Walden testified on direct, as here pertinent, as follows:

Q. At the Union hall is there a file marked Lester Alexander?

A. Yes.

Q. And in that file were there documents contained, which dealt with the suspension of Lester Alexander as a porter?

A. Yes.

Q. Let me show you what we have previously introduced in evidence, ... Respondent's Exhibit[s] [1, 2, 3, ,4 ,] 7 [,8, and 9].

[Are they] ... maintained in the file of Lester Alexander?

....

A. Yes.

Q. Okay, sir. And - -

MR. WALTON: Your Honor, I object to that series of questions [identifying the above-described Respondent's Exhibits] because of lack of relevance.

MR. FLAXMAN: I'm trying to tie these documents into what people knew or didn't know.

JUDGE WEST: The objection's overruled.

Q. BY MR. FLAXMAN: And, in fact, did I not receive these documents from you, Mr. Walden?

A. Yes.

Q. And you were fully aware of the suspension and the facts surrounding these documents, correct?

A. Yes.

Q. And to your knowledge, who else knew about Lester Alexander's suspension as a porter?

A. I would day the president; the financial secretary; most likely the office secretary, because everything comes through there; she probably reads it; the Executive Board. And I would say Mr. Alexander himself.

JUDGE WEST: Sorry for interrupting. Sir.

THE WITNESS: Yes.

JUDGE WEST: You just testified most likely the office secretary because everything goes through.

The question was, to your knowledge.

5 THE WITNESS: To my knowledge, the president, the financial secretary, Mr. Lester Alexander, myself, and the Executive Board.

Q. BY MR. FLAXMAN: Why is it that they would have knowledge of something like this?

10 A. Because we would discuss something of that nature at Executive Board meetings.

JUDGE WEST: I'm sorry. Sir, again, you testified 'we' would discuss. The question is why?

15 Did you discuss, in fact, and when?

THE WITNESS: I don't have the exact date. If whatever date that letter is addressed we discuss it in a meeting that was following that particular letter.

20 JUDGE WEST: Which letter are you referring to now?

THE WITNESS: Any letter that was sent, we discussed it in the prior meeting.

Q. BY MR. FLAXMAN: You mean the subsequent meeting?

25 A. Pardon me?

Q. The later meeting?

30 A. The later meeting. The next meeting we would discuss issues concerning - - any issues concerning that was brought up.

Q. Why would you do that?

35 A. Because that's the purpose of our meeting, to maintain a good run Local and address issues that come about.

Q. How important to the Local was tip solicitation?

40 A. That's one of our - - one of our top priorities there. One of our [sic] most complaints we get are concerns based on the cruise industry is the badgering of passengers for tips.

JUDGE WEST: I'm sorry for interrupting.

45 On that point, so we've got it at one place in the record, you just testified that this type of a situation is very, very important to the Local, and you testified that any of these letters would have been discussed at subsequent Executive Board meetings, is that correct?

50 THE WITNESS: Correct.

JUDGE WEST: Are you in a position to cite any minutes of any Executive Board



meeting following these letters, which would indicate that, in fact, they were discussed, and since they were so very important, they were included in the written minutes of the meetings?

5 THE WITNESS: No, I don't - - I can't recall. It would be recorded in the minutes itself because like I say, Mr. Alexander writes the minutes and he may have not felt that was important enough for him to include those in the minutes.

10 We had numerous discussions with him about omitting certain things out of the minutes.

JUDGE WEST: Okay. But you felt that - - you just testified that these are important issues; this is an important issue?

15 THE WITNESS: Correct.

JUDGE WEST: Did you attend all of the Executive Board meetings?

20 THE WITNESS: Yes.

JUDGE WEST: At the subsequent Executive Board meetings did Mr. Alexander read the minutes from the prior Executive Board meeting?

25 THE WITNESS: Not always. He wouldn't attend all meetings.

JUDGE WEST: At some point did he read the minutes from prior Executive Board meetings?

30 THE WITNESS: I would say yes.

JUDGE WEST: Were you present when he read the minutes from the prior Executive Board meetings?

35 THE WITNESS: Yes.

JUDGE WEST: At that time, did you point out that there was a shortcoming in the minutes ... [in] that they didn't cover the prior discussions of these letters, which were very, very important because they went to tips solicitation?

40 THE WITNESS: No. At one point something like that - - something else that he would put in the minutes that was incorrect, I would point that out to him, but if he didn't put something in there he would always say he didn't feel that was relevant enough to put in there.

45 JUDGE WEST: Okay. And at that point couldn't you indicate to him that you believed that it was important and, therefore, it should be included. [A]nd wouldn't the minutes be amended?

50 THE WITNESS: Yes I could have done that.

JUDGE WEST: And did you, at any point, do that?

THE WITNESS: No.

JUDGE WEST: Proceed.

5 Q. BY MR. FLAXMAN: The minutes appear to be two and three pages.

How long were these meetings?

10 A. Sometimes the meetings would last two and three hours.

Q. So the minutes are not a verbatim transcript of what occurs?

A. No.

15 Q. Did anyone other than Mr. Alexander prepare the minutes in the last several years?

A. No.

20 Q. The meeting of December 16, 2002 is only one page. Do you recall how long that meeting took, more or less?

A. Normally it has the opening and closing time on there.

25 Q. It doesn't say. 1:00 p.m. Let's take a look. It just says it started at 1:00 p.m. It doesn't say when it closed.

Okay. The meeting of September 3, 2002 does say starts at 5:30 p.m., closes at 9:25 p.m.

30 Is that unusual to have a meeting that long?

A. On occasions we have meetings that long if we have a - - we may have a trial or something and it may take longer.

35 Q. So there are times on this, but there's no time stated on this particular minute.

Do you recall what was said about Mr. Alexander at that meeting, as far as him not being qualified or anything of that nature, in the meeting of December 16 when the second man was chosen?

40 A. Do I recall - - what was the question again?

Q. Do you recall what was said in relation to Mr. Alexander and his qualifications for second man after the December 16, 2002 meeting? [Emphasis added]

45 A. Based on my recollection, I would say for someone being chosen as a porter header, and to have so many complaints against you regarding badgering of passengers for tips, that was one of the complaints we had against him. [Emphasis added]

50 JUDGE WEST: Sorry. For the record you just testified that someone being chosen as a porter header?

THE WITNESS: Yes. That was the position that was open. I mean second man. I'm sorry.

JUDGE WEST: Okay.

5

Q. BY MR. FLAXMAN: So there was a conversation about the complaints against him, as far as you recall?

A. Yes.

10

Q. And do you recall specifically what was said, or what his response was?

A. No, I can't recall directly what his response was.

15

Q. In your vote, did Mr. Alexander's employment record play a part in your determination?

20

A. Yes, for that particular position it did. But as far as his working ability on - - he's a good worker and if another position came up in a cargo gang, I wouldn't have a problem with selecting Mr. Alexander, because he is a good worker.

25

But as far as he has a history of badgering passengers for tips for some reason - - I didn't write those letters. The letters came from the company and they come from passengers themselves. [Only one letter from a passenger was introduced into evidence and as noted above, it refers to two porters, one of whom tried to help the passenger.]

Q. All right, sir.

30

A. It's not like someone was singling him out.

MR. FLAXMAN: Okay, I have no further questions. [Transcript pages 192 – 201]

35

The above-described testimony of this one witness constitutes the Respondent's attorney's attempt to connect certain testimony and the documents he introduced into evidence, subject to connection, regarding tip solicitations with a discussion and consideration thereof by the Executive Board at the December 16 Executive Board meeting when it voted on whether Alexander should receive a second man position. As noted above, this one witness was asked by Flaxman if he "recall[ed] what was said in relation to Mr. Alexander and his qualifications for second man after the December 16, 2002 meeting." (emphasis added) According to the transcript, Flaxman did not ask this one witness what was said specifically with respect to the tip solicitation allegation involving Alexander at the December 16, 2002 meeting. Flaxman did not make the connection.

40

As here pertinent, Harold Walden testified on cross-examination as follows:

45

Q. BY MS. VALENZUELA: Mr. [Harold] Walden, you had testified that at the December 16 meeting, Lester's previous complaints that Lester had received were discussed, correct?

50

A. The previous complaint was discussed. I'm quite sure it was, yes.

JUDGE WEST: Complaint, single, as opposed to complaints, plural?

THE WITNESS: All the complaints you're saying or - -

Q. BY MS. VALENZUELA: I'm asking you.

A. We discussed complaints at meetings, yes. So whatever was on that agenda, or whatever information we had got with - -

JUDGE WEST: It's limited to December 16, 2002.

THE WITNESS: Well, I can't recall exactly what was discussed December 16, because I don't know which letter you're talking about right off the top of my head.

Q. BY MS. VALENZUELA: At the December 16, 2002 meeting, did anyone discuss complaints against Lester Alexander?

A. We discussed complaints. If it was a complaint out there, I'm quite sure we discussed it.

Q. Okay.

JUDGE WEST: I'm sorry. For the record, if there's a complaint out there, out there to me means that its something that's recent.

Is that what you're - -

THE WITNESS: Correct. If we had received - -

JUDGE WEST: Let me finish my question, please.

THE WITNESS: Go ahead.

JUDGE WEST: In other words, if you discussed at the December 16, 2002 Executive Board meeting any complaints against Lester Alexander, they were recent complaints?

THE WITNESS: It was within the time period of one meeting to the next meeting. If I were to see something in between here concerning Lester Alexander, we discussed it, yes.

JUDGE WEST: When was the prior Executive Board meeting?

THE WITNESS: We have it the first Monday of every month.

JUDGE WEST: Proceed.

Q. BY MS. VALENZUELA: Do you recall receiving something in between those two meetings concerning complaints against Lester Alexander?

A. I can't recall. If you have the documents in front of you, if it's dated between there, I received it.

Q. Do you recall discussing any complaints against Lester Alexander at the December 16, 2002 meeting?

5 A. Like I said, ma'am, if it was a letter sent out between one meeting to the next, if I received a letter, I'm quite sure we discussed the issues.

....

10 THE WITNESS: Well, if that was the meeting that was when the election took place [December 16, 2002], I'm quite sure we discussed all the past history, if that's what you're referring to.

15 If that was the particular meeting, that the second man position was selected. I'm quite sure other issues were discussed .... that didn't occur within that timeframe, if that's the meeting but I can't recall right off the top of my head is this December meeting you're talking about is the meeting that the second man was selected.

20 JUDGE WEST: The December 16, 2002 meeting is the meeting at which the second man was selected. Okay?

....

25 JUDGE WEST: who, if anyone, made a statement about any complaint regarding Mr. Alexander at the December 16, 2002 Executive Board meeting?

30 THE WITNESS: Well, I know I did for one.

JUDGE WEST: What did you say?

....

35 THE WITNESS: Thank you. Basically, I would say someone with so many - - the background he has had searching for a position of that nature wouldn't be qualified for that job. [Emphasis added]

JUDGE WEST: Have you finished your answer?

40 THE WITNESS: If you want a word-for-word - - and basically it was someone, by him being on the Executive Board, it was really - - made the Executive Board look bad for him to be accused of something of that nature and sits on the Executive Board also.

45 That was another blow to the Executive Board. Not only did it make him look bad, it made the surrounding Executive Board members look bad also, because we're supposed to be the ones setting an example for the rest of the membership to follow.

JUDGE WEST: Okay. So you said that also then on December 16.

THE WITNESS: Yes.

50 ....

JUDGE WEST: If the Local received some kind of correspondence indicating

what the final disposition [of the grievances against Alexander] was in March 2002, then at the next Executive Board meeting, you brought that up, is that correct?

THE WITNESS: Yes.

JUDGE WEST: So that would be in the minutes of that Executive Board meeting?

THE WITNESS: Well, like I said, I don't write the minutes, sir. Mr. Alexander write[s] the minutes and I'm quite sure he wouldn't have included that in there. So - -

JUDGE WEST: Proceed.

Q. BY MS. VALENZUELA: You didn't tell Mr. Alexander to include that information in the minutes, did you?

A. No, I didn't.

Q. You have stated what you said at the December 16, 2002 meeting concerning complaints against Lester.

Do you recall anybody else at the meeting saying anything concerning complaints against Lester, or grievances concerning Lester?

A. It was discussed, yes.

Q. Who said what?

A. I don't know who said what, but it was discussed.

Q. And Lester Alexander reads all of the minutes of the Executive Board meeting to the Executive Board, correct?

A. Yes. [Transcript pages 201 to 214]

....

Q. BY MR. WALTON: Did you discuss that [The above described March 13, letter, Respondent's Exhibit 2, which prohibited Alexander from working as a porter for Princess Cruise Lines and Celebrity Cruise Lines], or bring it up in the meeting of April 2, 2002?

A. Yes.

Q. Show us in those minutes where it is discussed?

A. If its not in there , sir, I didn't write those minutes. We discussed it. He [Alexander] doesn't write word-for-word what we discuss, sir. If we did that we would hire a Court Reporter to do that, or someone who can type - -

As noted above, excluding Alexander, there were six other Executive Board members and also Tunnage who were present at the December 16 Executive Board meeting. Other than

Harold Walden, who is Bynes cousin, the Respondent's attorney did not call any of them to testify about what was discussed and considered at this meeting. As noted above, Harold Walden did not testify on direct about what was discussed and considered regarding Alexander's qualifications on December 16. Rather, Harold Walden testified about what was discussed after December 16. See transcript pages 199 and 200. Alexander concedes that the tip situation was brought up by Tunnage to the Executive Board members in 2003. Tunnage did not testify to deny this. A discussion which occurred in 2003 does not connect the tip solicitation evidence to December 16, 2002. Also, as indicated above, it appears that there are audio recordings of the meetings. No attempt was made to introduce any recordings and/or transcripts, and if for some explainable reason recordings do not exist for the meetings in question, this was not brought out at the trial herein. Tunnage was not called by the Respondent so he does not refute any matter other than those brought out when he was called by Counsel for General Counsel. It has been shown that only one of the Executive Board members who voted on Alexander for a second men position on December 16, Harold Walden, knew about his five month suspension from serving as a porter on two cruise lines. There is no proof that any other Executive Board member who voted on December 16 knew anything about Alexander's suspension let alone discussed it or considered it on December 16. Indeed as noted above, Tunnage did not testify to deny that he told the Executive Board members about the suspension in 2003, well after the December 16 vote, and possibly after the charge and amended charge were filed in this proceeding. Alexander's testimony on this point is credited. The fact that Executive Board members were told about the suspension in 2003 also undermines any assertion that the Executive Board members discussed the suspension at the December 16 Executive Board meeting. Tunnage was at the December 16 Executive Board meeting. If he heard Executive Board members discussing the tip solicitation issue on December 16, 2002, Tunnage would not have needed to tell the Executive Board members in 2003.<sup>10</sup> Harold Walden is not a credible witness. I would not credit any of his testimony unless it is corroborated by a credible witness or a reliable document. Respondent's attorney never made the connection he promised. In these circumstances, if the tip solicitation issue was not discussed or considered by the Executive Board members at the December 16 meeting before the vote was taken, Respondent's Exhibits 1, 2, 3, 4, 7, 8, and 9 are not relevant. As noted above, Respondent's attorney indicated that if he could not make the connection, the involved matter could be stricken from the record. Since he did not make the connection, the objections of Counsel for General Counsel and the Charging Party are sustained and Respondent's Exhibits 1, 2, 3, 4, 7, 8, and 9 are hereby stricken from the record. Additionally the irrelevant testimony of Healey and Maravolo is stricken from the record.

### Analysis

Paragraph 6 of the complaint alleges that the Respondent (1) violated Section 8(b)(1)(A) of the Act since on or about November 8 (a) by maintaining and using unlawful subjective criteria in selecting and appointing employees to the position of second man, including (i) good moral character with membership, (ii) loyal and dedicated to the long shore craft, and (iii) be a

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<sup>10</sup> The Respondent's argument on brief that Alexander's suspension might have been discussed on December 16 after the vote and after Alexander left the meeting is grasping at straws. Obviously if it was not discussed before the vote, it was not part of a collective discussion and consideration in the voting process. There is no credible evidence of record that the suspension was ever discussed at the December 16 Executive Board meeting. Bynes testified that he has never been reprimanded by any employer, or disciplined by the Union, or any employer. There is no evidence of record that this was discussed and consideration at the December 16 Executive Board meeting before the involved second man position was voted on.

member in good standing, and (b) by maintaining and using unlawful subjective voting requirements by giving sole discretion to the Executive Board in selecting and appointing employees to the position of second man. Counsel for General Counsel on brief contends that case law clearly states that referrals made pursuant to an exclusive hiring or referral hall arrangement must be based on objective criteria applied in a nondiscriminatory manner, *Iron Workers Local 505 (Snelson – Anvil)*, 275 NLRB 113 (1985) and *Plumbers Local 619 (Betchel Corp.)*, 268 NLRB 766 (1984); that with respect to John P. Walden becoming a second man, Tunnage stated that he had made it official that John P. Walden was already a second man, but nonetheless asked the Executive Board to formally vote on it which demonstrates that the Respondent's determinations are individually and subjectively based, and the Executive Board just goes along with whatever President Tunnage wants; and that John P. Walden automatically stepped into a vacant header position. The Respondent on brief argues that a union may bar applicants from its referral system based on legitimate business considerations and absent proof of a statutorily proscribed objective; and that while it is recognized that in the context of encouraging union membership a referral system that relies on purely subjective criteria without any objective criteria itself violates the Act, *Laborers, Local 394*, 247 NLRB 97 (1980), here union membership is not at issue, Alexander has accumulated many more hours of work on an annual basis than has Bynes, and what is at issue is a promotional status change.

The Respondent operates an exclusive hiring hall and longshoremen get referred to jobs by going to the Union hall. Allegedly three of its criteria for selecting second men are unlawfully subjective, namely (i) good moral character with membership, (ii) loyal and dedicated to the long shore craft, and (iii) be a member in good standing. Before General Counsel's Exhibits 12 and 13, which give the criteria, were introduced, the Respondent's attorney gave the following responses on the record:

JUDGE WEST: So there is a document indicating that certain criteria are to be considered in determining whether someone should be chosen for the second man position?

MR. FLAXMAN: Yes.

....

JUDGE WEST: Do these criteria indicate what weight is to be accorded to - -

MR. FLAXMAN: There is no - - no, there is no number. There's no one to ten, no evaluation in that area, just one of the criteria.

JUDGE WEST: Okay. So someone might have, for the sake of argument, five, ten years more seniority than the other candidate ... and this allegation, with respect to the solicitation of tips, might outweigh that five or ten years of seniority in the mind... of an Executive Board member?

MR. FLAXMAN: Depending on the nature of the gravamen, the stevedore who's doing it, what the outcome was of the allegation, if so - - to answer your question, numerous factors would be considered.

....

JUDGE WEST: Although the criteria, under which this allegation was allegedly considered, the criterion was one of a number of criteria which does appear in print,



there's no balancing test in writing?

MR. FLAXMAN: There's no balancing test in writing.

5 ....

MR. FLAXMAN: And, your Honor, we have stipulated that the criteria related to Union membership is unlawful, and we have voluntarily deleted that from consideration.

10 ....

JUDGE WEST: I realize that it undoubtedly will be cleared up when we receive the written criteria, but I note in looking at the Complaint, vis-à-vis the answer, the Complaint refers to good moral character with membership. Page 2 of the answer just refers to good moral character.

15

MR. FLAXMAN: I don't think we have a right with membership.

JUDGE WEST: Okay. My question would be, I'm not really sure I understand what good moral character with membership, vis-à-vis outside membership, really means.

20

MR. FLAXMAN: I don't either. I think that with membership should not be a criteria.

25

....

MR. FLAXMAN: The intent may have been with being a member. [Transcript pages 20 – 22]

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And after General Counsel's Exhibits 12 and 13 were received but before Harold Walden testified, the Respondent's attorney gave the following responses:

JUDGE WEST: Mr. Flaxman, I have a question for you.

35

....

JUDGE WEST: We, you and I, discussed earlier the different language used in both the Complaint and the answer. The one criterion I pointed out was the first cited in the Complaint, good moral character with membership. ....

40

What exactly, in your opinion, is good moral character with membership?

....

45

JUDGE WEST: I'm focusing on 'with membership.'

MR. FLAXMAN: That's a violation. In other words, I don't know what it means. It doesn't make sense, with membership. [Emphasis added]

50

The way I'm interpreting it to mean with Union membership. In other words, unless it means - -

....

5 ... Unless it means with membership. In other words, among the members, perhaps. I just don't know. With membership may have a connotation somehow that you have to be a member.

JUDGE WEST: Okay. That's your feeling about this.

10 MR. FLAXMAN: Yeah. That somehow it has a nexus.

JUDGE WEST: All right. So then it would be, as far as the criteria are concerned, it would be a dual approach. In (i) they're saying the person had to be a member. And in (iii) the person has to be a member in good standing. In other words, pay  
15 their dues, etc.

Is that - -

20 MR. FLAXMAN: That's out. I mean we've agreed that that's - -

JUDGE WEST: All right, Now as far as reading what existed in December of 2002 - -

....

25 JUDGE WEST: - - December 16th, you had good moral character with membership, and then you also had be a member in good standing.

30 MR. FLAXMAN: Right.

JUDGE WEST: So in other words, are they saying that the person had to be a member in (i) that one criterion - -

35 MR. FLAXMAN: Well, I think - -

JUDGE WEST: - - and then in another criterion they said has to be a member in good standing?

40 MR. FLAXMAN: Yeah, I think what they're saying is good moral character with the membership. In other words, among the membership, you are considered as a good - - you have a good moral character. It should say among the membership.

45 In other words, it's bad wording. Grammatically, it should - - I think their intent was among the membership. The membership believes this is a person of good character.

Now that, I think would violate the Act because that may disadvantage a non-member. How is he going to get the same respect as a member? [Emphasis added]

50 JUDGE WEST: And if your interpretation is correct, good moral character among the membership. In other words, the membership believes you to have good moral character?

Is that your interpretation?

5 MR. FLAXMAN: Yeah, I think that's my interpretation. I don't think that's a lawful criterion. [Emphasis added]

....

10 MR. FLAXMAN: I think it should say - - I think good - - in my answer [to the complaint] I say good moral character [As noted above, the answer does not include the words 'with membership' which words are included in the criterion and in the complaint.] is a, in my opinion, a lawful criteria.

15 JUDGE WEST: Okay. But when you, again focusing on with membership - -

....

20 JUDGE WEST: - - is that supposed to mean that the membership has some input with respect to whether ... [the candidate has] good moral character?

MR. FLAXMAN: To a certain extent; in other words among the membership. In other words, does the membership view you as having good moral character, so yes.

25 JUDGE WEST: So in order to fulfill the dictates of that criterion, would it be necessary to canvass, to issue a questionnaire to [the] membership as to whether they believed ... [the candidate has] good moral character?

30 MR. FLAXMAN: Not necessarily. I'm involved with another Local that has - - we have three or four people that are constantly accused of sexual harassment. I don't think that you - - I don't think you would have - - I think it would be your general reputation among the membership.

35 I mean I don't think - - but I'm saying that we - - I think good moral character should end there. I don't think among the membership because that may disadvantage a non-member.

40 JUDGE WEST; Could that language mean that you have to have good moral character in your .... dealings with the other members of the Local?

MR. FLAXMAN: Could be.

JUDGE WEST: Could be that too?

45 MR. FLAXMAN: Could be that too, but I' agreeing with the Board on that , that membership should not be - -

50 JUDGE WEST: All right. Well, could it also mean that you should have good moral character with officials of the Local since they too are members?

MR. FLAXMAN: Not really, because in fairness to them, they have said - - in their own minutes it says it's Webster's Dictionary. So they're looking at a more generic,

they're not - - I think you're going to get a little specific now and that would be patronage.

In other words, well, you know, I don't think that was their intent. If you look at the minutes, it says we're using Webster's Dictionary, so - -

5

JUDGE WEST: Do you have General Counsel's Exhibit 12?

....

10

JUDGE WEST: We're looking at the very last page of General Counsel's Exhibit 12.

MR. FLAXMAN: .... correct, but it ['and officials of Local 1526'] was scratched out. I mean it's not there.

15

JUDGE WEST: So it was considered at one point.

MR. FLAXMAN: Could have been. Could have been. You know.

20

....

MR. FLAXMAN: But it wasn't used.

JUDGE WEST: But if - - well, we don't really know what the intent was, do we?

25

MR. FLAXMAN: What did they mean by with membership and officials of Local 1526?

30

MR. FLAXMAN: Well, they scratched it out. I assume they meant that with the officials and with the membership you're supposed to be perceived as a good person.

And somebody probably said, wait a while, that's - - you know, why don't we use Webster's Dictionary. Let's see what that definition is generally. You know, they took out an official thing.

35

They took it out. Hard to - - you know, you take something out, it means you're cognizant that it shouldn't be in there. [Transcript pages 144 – 151]

40

The Respondent's own attorney concedes that two of the three challenged criteria as they were utilized, as here pertinent, since November 2002 (taking into consideration the 6 months before the original charge was filed) are unlawful.<sup>11</sup> With the wording utilized in criteria (i) and (ii) it is not even clear what they mean on their face. The former is treated above. With respect to the latter, could it be interpreted to mean loyal and dedicated to President Tunnage, Vice President Harold Walden, and their ways? Alexander's testimony that Tunnage and Harold Weldon drafted these criteria and got the Executive Board to approve them in short order is not denied.<sup>12</sup> Also Alexander's testimony that the General Counsel of the International told him that

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<sup>11</sup> As noted above, "[b]e a member in good standing" is no longer utilized.

50

<sup>12</sup> The Respondent's attorney was not sure what the criteria we discussed actually meant so it is not hard to understand how Alexander, who is a longshoreman, might conclude that basically the criteria spoke to seniority and qualifications.

the criteria had to be voted on by the membership is not denied. Tunnage and Harold Walden demonstrated how they controlled the situation when Tunnage moved John P. Weldon into a second man position so that he was able to become a header. That is what this is all about. Harold Walden and Tunnage want to control who eventually becomes a header. It appears that they only want headers who are loyal and dedicated to them. Harold Walden and Tunnage view the subjective criteria and the voting approach as their means of accomplishing this. By using ambiguous and unlawful subjective criteria, and by using the Executive Board to carry out their wishes, Harold Walden, Tunnage and the Respondent have violated the Act as alleged in paragraph 6 of the complaint.

Paragraph 7 of the complaint alleges that the Respondent violated Sections 8(b)(1)(A) and 8(b)(2) of the Act on December 16 by failing to select and appoint Alexander to second man positions with Hallmark and Eller by using the unlawful subjective criteria and voting requirements described above, and for arbitrary, capricious and invidious reasons. Counsel for General Counsel on brief contends that the Respondent unlawfully used its subjective criteria and voting requirements as well as its animus toward Alexander for 'dissident activities' when failing to select and appoint him to a second man position on December; that at one point Tunnage told Alexander that he was going to take his union card, kick him out of Local 1526, and bar him away from the union hall; that Tunnage admitted that Alexander had more seniority than Bynes and that Alexander was qualified for the porter second man position on December 16; that John P. Walden, who was unilaterally given a second man position by Tunnage and promoted to header when his header left, should not have remained on the Executive Board let alone be allowed to vote; that both John P. Walden and his brother Harold Walden are cousins of Bynes; that animus and nepotism played a role in the appointment of Bynes; that the Board has held that discrimination in job referrals based on nepotism violates Section 8(b)(1)(A) and 8(b)(2) of the Act, and referrals made without reference to objective criteria or standards are invalid, *Local Union No. 174, Teamsters*, 226 NLRB 690 (1976) and *Polis Wallcovering Co.*, 262 NLRB 1336 (1982); that a labor organization violates the Act when it applies arbitrary or invidious criteria in referring employees to jobs, *Operating Engineers Local 406*, 262 NLRB 50 (1982) en'f'd. 701 F.2d 504 (5th Cir. 1983) and *Asbestos Workers Local 80 (West Virginia Insulators)*, 270 NLRB 1124 (1984); that a union violates the Act when it refuses to refer a worker due to dissident union activity or political rivalry, *H.H. Robertson Company*, 263 NLRB 1344 (1982); that Alexander's relentless search for equity and compliance with the Respondent's own collective bargaining agreement and Constitution led Respondent to harbor strong animosity towards him; and that this animosity, in addition to the subjective criteria and voting requirements, led the Respondent to fail to select and appoint Alexander to the second man position on December 16. The Respondent on brief argues that there is no dispute that Alexander was an outspoken individual who made complaints about union affairs and admittedly General Counsel has shown under *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993) that there could be an illegal discriminatory motive, but the prima facie case does not end there because General Counsel must also show that Alexander's complaints were a motivating factor in the Respondent's decision to cause Alexander not to be chosen for the second man position; that General Counsel must prove that animus was a substantial and motivating factor in Respondent's decision to take adverse action, *Manno Electric*, 321 NLRB 278, 280 at footnote 12 (1996); and that there is no record evidence that Alexander's complaints about Respondent's affairs were discussed at the December 16 meeting.<sup>13</sup>

<sup>13</sup> Certainly with the meeting being recorded and with Alexander taking the minutes, it is not reasonable to expect that Alexander's complaints about the Respondent's affairs would be openly discussed by Tunnage and the Executive Board before the Executive Board voted on whether Alexander should become a second man.

The rule of *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983) has been applied to cases such as the one at hand. *Painters Local 277 (Polis Wallcovering)*, 271 NLRB 58 (1984). To establish a prima facie case General Counsel must establish protected activity, the Respondent's knowledge, animus, and adverse action taken against the one who engaged in protected activity. General Counsel must establish that the protected conduct was a motivating factor in the Respondent's decision. If this is established, the burden will shift to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

As conceded by the Respondent on brief there is no dispute that Alexander was an outspoken individual who made complaints about union affairs and admittedly there could be an illegal discriminatory motive. The Respondent was fully aware of Alexander's protected conduct. Tunnage did not deny that he threatened Alexander in response to his September 13 letter. And Tunnage testified, when called by General Counsel, that Alexander had more seniority than Bynes, and Alexander was qualified for the second man position. Yet Bynes, who is the cousin of Executive Board members Harold and his brother John P. Walden, was chosen over Alexander. A majority of the involved criteria which existed at the time, along with the approach taken, have been found above to be unlawful. A union cannot discriminate against a member because he criticizes or opposes union leadership or because of the personal animosity between the member and the President of the Local. *Painters Local 277 (Polis Wallcovering)*, supra. The justification asserted by the Respondent is non-existent. It has not been shown that any Executive Board member who voted on December 16, other than Harold Walden, knew about the alleged justification. And it has not been shown that the alleged justification was discussed or considered by the Executive Board on or before December 16. For these reasons, along with the reasons given by Counsel for General Counsel, as summarized above, the Respondent violated the Act as alleged in paragraph 7 of the complaint.

### Conclusions of Law

1. Hallmark, Eller, and other employers that are a part of SFEPA are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, International Longshoremen's Association, Local 1526, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By since on or about November 8, 2002 (a) maintaining and using unlawful subjective criteria in selecting and appointing employees to the position of "second man", including (i) good moral character with membership, (ii) loyal and dedicated to the long shore craft, and (iii) be a member in good standing, and (b) maintaining and using unlawful subjective voting requirements by giving sole discretion to the Executive Board in selecting and appointing employees to the position of "second man," the Respondent violated Section 8(b)(1)(A) of the Act.

4. By on December 16 failing to select and appoint Alexander to second man positions with Employers Hallmark and Eller by using the unlawful subjective criteria and voting requirements described above, and for arbitrary, capricious and invidious reasons the Respondent violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily failed to select and appoint Lester Alexander to a second man position, it must select and appoint Lester Alexander to the second man position in a porter gang under Header Willie Mann, displacing Ervin Bynes, if necessary, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make Lester Alexander whole for any loss of earnings and other benefits, computed on a quarterly basis from December 16, 2002 to date that Lester Alexander is selected and appointed to the second man position on a porter gang, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

## ORDER

The Respondent, International Longshoremen's Association, Local 1526, AFL-CIO, of Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Maintaining and using unlawful subjective criteria in selecting and appointing employees for second man positions.

(b) Maintaining and using unlawful subjective voting requirements by giving sole discretion to the Executive Board in selecting and appointing employees to the position of second man.

(c) Failing to select and appoint Alexander to second man positions with Hallmark and Eller by using the unlawful subjective criteria and voting requirements described above, and for arbitrary, capricious and invidious reasons.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's order, use and maintain lawful objective criteria and lawful voting requirements in selecting and appointing employees for second man positions.

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<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of the Board's order, select and appoint Lester Alexander to the second man position in a porter gang under Header Willie Mann, displacing Ervin Bynes, if necessary, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Lester Alexander whole, plus interest, for any loss of earnings and other benefits suffered as a result of Respondent's failure to select and appoint him to the position of second man under Header Willie Mann on or about December 16, 2002, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to select and appoint Alexander to the second man porter gang position under Header Willie Mann, and within 3 days thereafter notify Lester Alexander in writing that it has done so and that it will not use the unlawful failure to select and appoint Alexander to the second man porter gang position under Header Willie Mann against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records in the possession of the Union, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its union office and hiring hall in Ft. Lauderdale, Florida, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees and members of the Respondent at any time since November 8, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

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John H. West  
Administrative Law Judge

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<sup>15</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



## APPENDIX

## NOTICE TO MEMBERS

5 Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

10 The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT maintain and use unlawful subjective criteria in selecting and appointing employees for second man positions.

15 WE WILL NOT maintain and use unlawful subjective voting requirements by giving sole discretion to the Executive Board in selecting and appointing employees to the position of second man.

20 WE WILL NOT fail to select and appoint you to second man positions by using the unlawful subjective criteria and voting requirements, and for arbitrary, capricious and invidious reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

25 WE WILL within 14 days from the date of the Board's order, use and maintain lawful objective criteria and lawful voting requirements in selecting and appointing employees for second man positions.

30 WE WILL within 14 days from the date of the Board's order, select and appoint Lester Alexander to the second man position in a porter gang under Header Willie Mann, displacing Ervin Byner, if necessary, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

35 WE WILL make Lester Alexander whole for any loss of earnings and other benefits suffered as a result of Respondent's failure to select and appoint him to the position of second man under Header Willie Mann on or about December 16, 2002.

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WE WILL within 14 days from the date of the Board's order, remove from our files any reference to the unlawful failure to select and appoint Alexander to the second man porter gang position under Header Willie Mann, and WE WILL within 3 days thereafter notify Lester Alexander in writing that we have done so and that we will not use our unlawful failure to select and appoint Alexander to the second man porter gang position under Header Willie Mann against him in any way.

International Longshoremen's Association, Local  
1526, AFL-CIO

(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602-5824

(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.